UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITED STATES OF AMERICA

CASE NO. 15-60669

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

VCNCL, L.L.C., doing business as
Vineyard Court Nursing And Rehabilitation Center

Respondent

ON APPLICATION FOR ENFORCEMENT AND PETITION FOR
REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF ON BEHALF OF RESPONDENT-EMPLOYER VCNCL, L.L.C.

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I. INTRODUCTION

The NLRB's Brief frames every issue as a matter within its broad discretion. This framing is incorrect. NLRB actions which burden Employer's petitioning speech are not within its discretion to act, nor subject to any judicial deference. Administrative outcomes are outside administrative discretion when requisite determinations were never made by the NLRB in the first place, or where the NLRB has not followed its own rules or has ignored judicial limitations placed upon its decision making process. Herein Employer presents facts and reply argument establishing the NLRB's misconduct exceeded its administrative discretion and/or failed to make certain decisions the NLRB insists upon the Court deferentially upholding.

II. STANDARD OF REVIEW FOR A DENIAL OF A HEARING ON OBJECTIONS

The NLRB relies upon *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969) to support its claim that it has a "wide degree of of discretion" to determine whether an employer is entitled to a hearing on its objections. NLRB's Brief at p. 45. The NLRB dismisses more recent authority like *NLRB v. Hood Furniture Mfg.*

Co., 941 F. 32d 325, 332 (5th Circuit 1991), and other Fifth Circuit cases, which require a *de novo* review of whether an objecting employer is entitled to an evidentiary hearing on its objections.

The NLRB incorrectly claims the later decisions requiring *de novo* review are in conflict with *Golden Age*. Further, the NLRB argues that because *Golden Age* is the earlier precedent, it is controlling because it is an earlier panel decision which conflicts with the subsequent decisions, *citing, Rios v. City of Del Rio*, 444 F. 3d 417, 425, n. 8 (5th Cir. 2006). This reliance is misplaced because this Circuit's later cases were decided after the NLRB changed the underlying regulation applied by the Court.

Prior to September 15, 1981, the Board's regulations provided for hearings when it "appears to the regional director that substantial and material factual issues exist which, in *the exercise of his reasonable discretion*, he determines may be more appropriately resolved after a hearing." See 29 CFR §102.69(d) (1980) (italics added). *Golden Age* was decided under this version of the regulation which grants wide discretion to the Regional Director. The Regulation was modified in 1983 to remove the discretion. "Such hearing *shall be conducted* with respect to those objections or

challenges which the Regional Director concludes raise substantial and material factual issues." 29 CFR §102.69(d) (1983)(emphasis added).

At the time *Golden Age* was decided, a regional director had significantly more discretion under the Regulations in place. Because of the material changes in the Regulations, *Golden Age* is not in conflict with the later cases requiring a *de novo* review of a denial of a hearing on objections.

Because the NLRB conducted no evidentiary hearing on Employer's objections, this Court must assume the truth of all of Employer's factual statements presented at the objections stage as well as all reasonable inferences in the light most favorable to employer. *Trencor, Inc. v. NLRB*, No. 96-60130, 110 F3d 268, 269 (5th Cir. 1997).

III. REPLY ARGUMENT

All cases involving objections to the conduct of a representation election conducted by the NLRB have two fact components. The first component concerns what occurred (i.e. what was said, what was done, who said or did it, when or where it was

said or done). For discussion purposes we call this first component "conduct facts".

The second fact component is whether the conduct affected the outcome of the election. The second fact analysis involves whether the objectionable conduct had an objectionable effect. We call the second component "effects facts".

A. Employer's Protected Speech

In its principal brief, Employer presented law and legal arguments establishing the NLRB improperly burdened Employer's protected, petitioning speech. Neither the NLRB nor the union has presented any persuasive opposition argument or authorities challenging Employer's assertions (1) the Union's charge, ROA 322 (057) and amended charges, 239A (1), 322 (073) and the NLRB's Complaint ROA 288A (1-8) are baseless, or (2) that they violate the prohibitions of 29 USC § 158(c), or (3) that they also interfered with Employer's speech rights guaranteed by the First Amendment.

Employer's proffered "conduct facts" raise material and substantial questions about the laboratory conditions for the representation election. Rather than challenging the occurrence of

the conduct facts, the NLRB mischaracterizes the Employer's evidence as a "defense" to the alleged unfair labor practice, and asserts it has an "obligation to investigate a charge or issue a complaint." NLRB's Brief p. 47. The NLRB's argument evidences its profound misunderstanding of the limitations placed upon its authority to Act. Employer has not asserted a defense, it has presented a statutory and Constitutional prohibition upon the specific action the NLRB has taken against Employer's protected petitioning speech. While some brief, initial investigation of a baseless charge might be defensible, conducting an investigation during the entire 2 month pre-election period[1] and issuing a baseless, bad faith complaint right before the election is flagrantly inappropriate.[2]

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[1] The NLRB delayed initiating any investigation until November 17, 2003. ROA 322 (062-3). Employer promptly responded and provided the facts and argument sufficient to place the NLRB on notice of the baseless nature of the Charge. ROA 064-70. The Union's assertion in its brief, Union's brief at 26, that Employer provided no facts or case law supporting its position during the investigation is abjectly false.

[2] A similar case is pending in this Circuit involving serious allegations of malfeasance in the handling of an unfair labor practice investigation by this same Regional Office of the NLRB. *Sanderson Farms Inc., et al v. NLRB, et al*, CA No. 15-60333, *consolidated with* 15-60820. Appellant Sanderson Farms Principal Brief, Doc. No. 00513126727 (filed July 23, 2015) at pp. 2-7, 18-22, details the Employer's allegations of NLRB dishonesty.

The Intervenor partially addresses the conduct facts[3], but incorrectly claims "Employer's counsel stated that the presence of several CNA witnesses subpoenaed to testify for the Union constituted a violation Section 8(g) of the Act." Intervenor's Brief p.p. 19-20. This is a mischaracterization of Employer's undisputed statement. The precise statement transcribed was "I am not sure this is AG[4] protected." ROA 100. The statement was not directed at employees at all. It was part of a legal argument based upon the union's orchestrated disruption of Employer's operations. The witness testifying at the time of the discussion was Employer's witness. ROA 102-3.

The Union wildly extrapolates the statement to be a threat to employees. It is clear from the context this statement has nothing to do with the witnesses' presence at the hearing, rather it relates to the Union's disruptive manor of instructing the witnesses not to

[3] The Union does not challenge Employers legal analysis of the petitioning speech issue.

[4] There is no dispute that Employer's counsel referenced Section 8(g) of the Act. The transcription, however, indicates what a non-attorney court reporter "heard". At a minimum there is a substantial question as to whether any employee heard the statement and what was actually heard and understood by any employee before the statement can be even rationally alleged as subjectively threatening them.

inform Employer they were subpoenaed to testify until the end of the work day before the hearing. ROA 99-102, 322 (064-70)

As a part of Employer's legal argument concerning its inability to produce other witnesses, Employer questioned whether the Union engaged in a planned disruption of the workplace on the hearing day by making mandatory staffing inordinately difficult and disruptive. Employer's statement is an expression of doubt as to the legality of the union's conduct. *See* ROA 322 (064-70). Inferring the statement to be a threat to employees (either in isolation, or in context) is an irrational construct.[5]

The Union and the NLRB latched onto this oblique reference to "AG" and morphed it into an alleged "threat" which supposedly intimidated witnesses despite them actually testifying. See Employer's Principal Brief, p. 36, n. 17. The claim of a threatening

[5] No one has suggested the underlying disruption was a strike. It was a work disruption caused by the lack of notification of the union's subpoenas, not the employees complying with them. Because what occurred was not a "strike", the Union's conduct was likely unprotected and violated Section 8(g). However, the employees would not lose the protection of the Act. See, e.g., Civil Serv. Employees Ass'n, Local 1000, AFSCME v. N.L.R.B., 569 F.3d 88, 93 (2d Cir. 2009). ("While labor organizations are subject to sanction for either striking or picketing without observing the notice requirement specified by section 8(g) because of the obligation that section attributes to them, the statute specifies sanctions for employees who participate in the violation only in the case of strikes and not in the case of picketing (unless the employees are agents of the labor organization and have violated section 8(b)").

effect upon any employee is not based upon objective or subjective evidence. There is no plausible argument Employer's statement threatened employees.[6] If the statement is not threatening it cannot be an unfair labor practice. 29 USC § 158(c).

Moreover even assuming the Board may overcome the Section 8(c) bar, and rationally consider the statement threatening, Employer is still petitioning the government. Employer prevailed in its petitioning argument since no adverse inference was made concerning the failure to produce an LPN witness. Any claim this petitioning speech is somehow threatening to employees must yield to limitations placed upon the NLRB by the First Amendment. Just as the NLRB cannot consider a well founded lawsuit a threat in violation of the NLRA, it cannot find a well founded legal argument made in an NLRB hearing an unlawful threat. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U. S. 731, 737, 743 (1983). Moreover, even if Employer's argument had not prevailed *and* the

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[6] The NLRB and the Union assert Employer's counsel made the allegedly threatening remark in the presence of the subpoenaed employee witnesses, NLRB Brief p. 14, Intervenor's Brief p. 6. There is no evidence in the record the subpoenaed employees were present when the remarks were made, or heard the remarks, or were actually threatened by what was said. The employees testified and there is no indication in their testimony that they were adversely affected by Employer's statement. *See* Employer's Principal Brief at p. 36, n. 17.

NLRB had concluded Employer had a retaliatory motive, Employer's petitioning speech still can not be found a violation of the NLRA. *BE&K Const. Co. v NLRB*, 536 U.S. 516, 533-4, 536 (U.S. 2002). The Regional Director's actions improperly burdened Employer's petitioning speech.

B. Neither the Regional Director nor the NLRB properly considered evidence of objectionable effects facts.

The Regional Director incorrectly found the objectionable "conduct facts" were attributable to Employer's misconduct, not the Union's or the NLRB's misconduct. ROA 303. Therefore she concluded no wrongful "conduct facts" existed and that Employer was estopped from objecting to the conduct. Consequently the Regional Director never engaged in a proper analysis of the "effects facts" nor did she order a hearing, because she had already incorrectly concluded Employer's objections had not presented any wrongful conduct that was the not the result of Employer speech (which she had incorrectly concluded was unlawful). Contrary to the assertions in the NLRB's Brief, NLRB Brief p. 20, there is no evidence the Regional Director conducted an investigation of the

proffered objectionable conduct or its effects upon the laboratory conditions. *See*, ROA 302-04.

The NLRB's decision certifying the election adopted the Regional Director's facially erroneous findings. ROA 323-4. The Board decision also specifically finds Employer offered "no evidence of . . . a conspiracy". ROA 324. The NLRB's discussion of conspiracy is a straw man. The Employer does not need to prove the NLRB and the Union acted in concert for an unlawful purpose. While that may be what occurred, there is no requirement objectionable conduct must be concerted wrongdoing. The issue is whether an objectionable act destroyed the laboratory conditions for an election. Employer has consistently maintained the NLRB's bad faith allegations of Employer wrongdoing during the critical pre-election period interfered with the required laboratory conditions by falsely accusing Employer of wrongdoing.

In this Court, the NLRB has abandoned any claim the conduct facts are inadequate evidence of objectionable conduct. Essentially it argues the Employer failed to specify any adverse effects upon the election attributable to NLRB misconduct. In the rare case where the NLRB violates substantive free speech rights of an employer

during an election it is conducting, the proper remedy is to invalidate the election based upon an objective assessment of the severity of the misconduct and the effect on the laboratory conditions. The courts should not permit the Board to erect procedural barriers to insulate its own wrongful actions from review. Employer is not asking that the NLRB or its agents be held accountable for damages, or even be enjoined from acting. Employer challenges the outcome of an election tainted by the undisputed, material misconduct of the NLRB. The NLRB interfered with the employees' free choice.

The NLRB argues, that unless an employer proffers very detailed specific information concerning the subjective effect of specific conduct facts on specific employee voters, no adverse effect is established and no basis for overturning the election exists, and no grounds for even a hearing exist. When the NLRB engages in misconduct, the analysis of the effects component is not limited to specifics. In the case of NLRB misconduct, the effects component question is whether the objectionable conduct "tends to destroy confidence in the Board's election process, or . . . could reasonably be interpreted as impugning the election standards we seek to

maintain . . . ." *Athbro Precision Eng'g Corp.*, 166 N.L.R.B. 966, (1967), *vacated on other grounds sub nom., Electrical Workers IUE v. NLRB*, 67 L.R.R.M. 2361 (D.D.C.1968), acq. 171 N.L.R.B. 21 (1968), *enf'd.*, *NLRB v. Athbro Precision Engineering Corp.*, 423 F.2d 573 (1st Cir.1970) (invalidating an election, because Board agent was seen having a beer with Union agent between polling periods). The *Athbro* standard has been cited with approval in this circuit. *Delta Drilling Co. v. NLRB*, 406 F.2d 109, 112 (5th Cir. 1969). Under *Athbro*, the objectionable effect of the NLRB's wrongful conduct is evaluated under an objective analysis.

In *NLRB v. State Plating and Finishing Co.*, 738 F. 2d 733 (6th Cir. 1984) the Court refused to enforce the NLRB's order because the NLRB's neutrality was destroyed by comments it made which misled employees into believing their employer lied to them. *Id.* at 742. "The appearance of a compromise of Board neutrality will warrant setting aside an election even if the Board in fact remains neutral." *Id* at 740 n.5. *Athbro, Delta* and *Slate Plating* involved misconduct by an NLRB Board agent which warranted setting aside an election. Herein the misconduct occurred at a much higher level. The Union and the Regional Director wrongfully accused Employer

of violating the Act and initiated a bad faith legal action against Employer. The Regional Director's false allegations against Employer impugns the laboratory conditions.

Many types of objectionable conduct have been found grounds for setting aside an election without any evaluation of the specific effects of the conduct. (Failure to post election notices three days before the election, s*ee, e.g., Club Demonstration Services*, 317 NLRB 349 (1995); Failure to provide a list of eligible voters timely, or providing an incomplete or inaccurate list of eligible voters, s*ee, e.g., Merchants Transfer Co.*, 330 NLRB 1165 (2000); Changing paycheck distribution within 24 hours of election. S*ee, e.g., Kalin Const. Co., Inc.*, 321 NLRB 649 (1996).

C. Adequacy of proffered evidence of effects component

The NLRB expressly faulted the Employer for not explaining "how the investigation of the [Union's] charge could have been conducted differently," or "how the investigation intimidated the Employer from discussing the charge during the critical period, or how the complaint's issuance was in any way objectionable." ROA 324. Employer's primary response to this argument is to note the

baseless nature of the charge should have compelled a prompt disposition favorable to Employer. No investigation was warranted at all because the undisputed facts known to the Board precluded a violation.[7] The NLRB's misconduct is so grave, it should be presumed to impugn the laboratory conditions. Nevertheless, Employer also presented substantial material evidence of specific adverse effects.

Employer addressed specific effects in the Objections submitted to the Regional Director. ROA 306-08, *see also* 295B(1-2), and in Employer's Exceptions to the Regional Director's Report and Recommendations on Objections. ROA 309-22, and in supporting documentation ROA 322 (1-75). Employer provided specific evidence and argument concerning the wrongful effects of the NLRB's misconduct. *See, e.g.,* ROA 316 (baseless charge, false accusation of threats, last minute issuance of a bad faith complaint, Employer had no opportunity to respond.); ROA 316-17, 318 (Employer intimidated from speaking by threat of additional unfair labor practice charges); ROA 317 (objective analysis of effect

[7] Belatedly the NLRB and Union argue the employer failed to cooperate in the investigation of the Unfair labor practice. That is contradicted by Employers position statements. ROA 064-70.

on the election); ROA 318, 320 (manipulation of investigation to extend it during entire pre-election period).[8]

Under the NLRB's logic, Union or NLRB improper conduct is a wrong without a remedy unless an employer proffers evidence of a specific effect on specific voters. The NLRB's approach improperly limits the relevant evidence to subjective evidence of actual harm. While such evidence is probative, it is not the exclusive basis for proof the election is tainted.[9]

In this Circuit, the proper analysis of effect facts requires an evaluation of the cumulative effect of the conduct facts. *Home Town Foods, Inc. v. NLRB*, 416 F. 2d 392, 397 (5th Cir 1969). (The undisputed objectionable conduct presented by Employer, and its effect on the laboratory conditions must be considered "cumulatively"). Effect facts must be examined both objectively and subjectively. Both the Regional Director and the NLRB failed to look at the cumulative objective effect of the undisputed facts. Because the NLRB conducted no evidentiary hearing on Employer's objections, this Court must assume the truth of all of Employer's

[8] These issues were briefed. Employer's Principal Brief. PP. 44-49.

[9] The NLRB's failure to assess the objective effect of its own wrongdoing contrasts sharply with the ease with which it objectively determined Employer's oblique reference to "AG" had a threatening effect.

factual statements, presented at the objections stage as well as all reasonable inferences in the light most favorable to Employer. *Trencor, Inc. v. NLRB*, No. 96-60130, 110 F3d 268, 269 (5th Cir. 1997).

Herein the NLRB made no determination concerning the effect of the NLRB's own misconduct. The Regional Director deemed it unnecessary because she incorrectly blamed Employer for the Charge and Complaint. ROA 303. The NLRB did not consider evidence proffered concerning improper conduct or its effect, because it incorrectly determined Employer had not proffered the effects evidence, ROA 303-4, which indisputably *was* proffered.

The Employer made a compelling proffer of the type of discussions which the Board's misconduct discouraged, that it was within its right to make such statements, and that it did not do so because the NLRB, had already indicated discussing Section 8(g) was "threatening" to employees. The NLRB directly punished employer for its protected speech. The entirety of the circumstances, the NLRB's baseless allegation employer threatened employees, the issuance of the Complaint in violation of express statutory prohibition and the timing of the issuance ensuring

maximum impact upon the election, are specific events constituting harm to the laboratory conditions.

A second substantial wrong affecting the election is the silencing of the Employer's voice in the critical pre-election period. Employer asserted these wrongful effects in its objections, ROA 306-08, in its letter to the Regional Director, ROA 295B (01-2), and in its Exceptions to the NLRB and supporting documentation. ROA 309-22 (001-075). Employer specified the types of communications it was deprived of making. Proof of the specific effect of these deprivations on a specific voter cannot be given because the NLRB's improper conduct chilled the Employer's speech from occurring in the first place.

Because the NLRB's actions prevented employer from engaging in protected speech, it cannot be subjectively proved the proffered speech would have effected a specific voter or voters. But it equally cannot be said such speech would *not* change a specific employee's vote, in fact, when the government's enforcement agency falsely accuses Employer of an unlawful act, such adverse effect is reasonably probable.

The NLRB specifically prevented the Employer from communicating relevant information to voters. This infringement upon an Employer's speech rights is a substantive constitutional violation as well as a substantive violation of Section 8(c) of the Act. 29 USC §158(c). This substantive deprivation materially interferes with the laboratory conditions.

The Board's Opinion requires an employer to investigate and proffer facts indicating the subjective effect of conduct on specific employee voters. Interrogating employees about their subjective state of mind concerning their choice in a secret ballot election would certainly be considered an unfair labor practice by the NLRB. If subjective evidence of actual effect is the evidentiary standard required to establish a violation, such requirement is, indeed, intrusive. It appears the NLRB is requiring an employer to navigate an extraordinarily dangerous path in order to present the evidence the NLRB requires. In so doing the employer is subject to the NLRB's equally extraordinary propensity to second guess how an employer engages in the required evidence gathering.

Any inquiry of employees' views on election issues is so intrusive the process should be avoided where possible. This is why

the NLRB relies upon objective evidence to determine the effect of conduct. Historically the NLRB has refused to examine whether conduct actually coerced prospective voters. See *United Broadcasting Co.*, 248 NLRB 403, 404 (1980), *Modine Mfg. Co.*, 203 NLRB 527, 531 (1973).

Perhaps it could have determined, based upon its expertise, that any communications the Employer says it would have engaged in would have no effect upon the outcome of the election, and relied upon this Court to defer to its expertise.[10] *See*, *Boston Insulated Wire & Cable Sys. v. N.L.R.B.*, 703 F.2d 876, 882 (5th Cir. 1983) (Denial of hearing on employer's objections was not an abuse of discretion after NLRB concluded, based on the company's own evidence accepted as true, that misconduct was not sufficient to warrant an inference of interference with the employees' free choice). But to make such a finding, the NLRB must actually make and support a finding with some evidence on the record before its actions can be validated as within its administrative expertise.

[10] Employer is not suggesting it agrees such a finding is rational or supported by this Record, only that unless a review of the proffered effects of wrongful conduct under an objective standard had been undertaken, there is no decision subject to deference.

In this case neither the Regional Director, nor the NLRB made any such determination. The NLRB made no objective assessment of the effect of the undisputed facts upon the election process or voters. Without making that sort of finding, there is no basis for deferring to the NLRB's expertise, because no decision was made at all.

The Regional Director's issuance of the complaint on the eve of the election is a dramatic admission the action was intended to influence the election. There is no other procedural or substantive purpose to the timing of the Complaint's issuance. There was a prolonged investigation, yet there was nothing to investigate. The single statement by Employer's counsel occurred on the record in the October 31 hearing. The NLRB asserts no reason as to why the Complaint issued when it did (December 31), or what, if any, prejudice would occur by delaying the Complaint a few days until after the January 5th election.[11] After all, the Union amended the original charge on December 30, 2013, ROA 322 (073) and the Regional Director solicited Employer's evidence by letter dated that

[11] The Union blames the Employer for the prolonged investigation falsely claiming Employer provided no facts or case law to the NLRB. The Record contains Employer's prompt responses to information requests. ROA 322 (064-70, 074-75). Nothing the employer did caused or diminished the negative effect of the NLRB's wrongful, baseless action on the laboratory conditions.

same day. ROA 322 (071-2). Yet the Complaint issued even before Employer received the letter soliciting its position. *Id.*

Prudence dictates not risking interference with the laboratory conditions for the election by issuing a Complaint on flimsy legal and factual grounds. The only explanation for the action is that the issuance of the Complaint was in bad faith and intended to influence the election. It is certainly within the NLRB's legendary prognosticative expertise to know that such effect would occur. Yet, the NLRB did not objectively evaluate the effect of the proffered objectionable conduct. Instead it relied upon its incorrect conclusion Employer had not proffered sufficient evidence of "effects", a conclusion which is expressly contradicted by the record.

Issuing a bad faith complaint, one initiated by the Union's bad faith charges, was expressly timed to ensure maximum effect upon the voting. The close proximity to the election effectively precluded the Employer from countering the negative effects of the false, legally baseless allegations lodged against it by the federal government. Rather than acting as a neutral conducting an election

under laboratory conditions, the NLRB purposefully took sides with no lawful justification for doing so.

The NLRB falsely accused Employer of threatening voters, and did so just prior to the election, at a time when Employer was prohibited from addressing groups of employees about such false accusations. Given the cumulative effect of the NLRB's wrongdoing, it is reasonably probable the NLRB's misconduct substantially destroyed the required laboratory conditions. The election failed to afford the employees an untainted opportunity to make their choice.

The Election must be set aside. Enforcement of the NLRB's order must be denied.

D. Unit placement of LPNs

The Board and the Union argue that the exclusion of the LPNs from the unit was in accordance with prior NLRB precedent and within the NLRB's discretion. Both assert, that even though the Union's petitioned-for unit was not appropriate, the Regional Director, *sua sponte,* correctly found an appropriate service and maintenance unit which excluded the LPNs. The Regional Director

engaged in a simple slight of hand to provide the Union the voting Group it wanted.

Because the petitioned-for unit was inappropriate, a threshold determination of which employee groupings constituted an appropriate unit had to be made using the traditional community of interest standard. This is required by *Specialty Healthcare,* 357 NLRB No. 83 (2011), *enforced, sub nom. Kindred Nursing Centers East, L.L.C.,* C.A. Nos. 12-1027/1174, 727 F.3d 552, 565 (6th Cir. 2013) and *NLRB v. Lundy Packing Co.,* 68 F.3d 1577, 1580 (4th Cir. 1995). *See* Employer's Principal Brief pp. 56-67.

The criteria for the threshold determination of the unit must be the same for any component group of employees - the traditional community of interests analysis is that standard. *Id.* That is not what the Regional Director did. She found a service and maintenance unit was appropriate. To determine the composition of the service and maintenance unit, the Regional Director applied the traditional community of interest analysis to all employee groups, except the LPNs. The Regional Director excluded the LPNs applying the "overwhelming community of interest standard" to this threshold determination. ROA 322(031). This is contrary to *Lundy*

and *Kindred* because there was no proper threshold finding of an appropriate unit

If the threshold determination concerning LPNs had been made applying the same traditional community of interests standard applied to all other employees, the LPNs should have been included in the initially determined unit. The LPNs and the CNAs, share more terms and conditions of employment than do other included employee groups. See Employer's Principal Brief pp. 18-27. Under a community of interest standard, it is irrational to exclude LPNs who work closely with CNA's providing direct patient care, but include other distinct and isolated departments.

Had the Regional Director correctly determined the threshold presumptively appropriate unit, the LPNs should have been included under the traditional community of interest standard, and the Union, as the party seeking their exclusion, would have had the burden of proving their exclusion was required. Because she applied the wrong standard to exclude LPN's the the Regional Director improperly erected a high barrier applicable only to the LPNs.

The voting unit included approximately 47 employees. ROA. 290. The improper unit determination disenfranchised 15-20 LPNs which the Union wanted to exclude. ROA 245, 255-6.[12] Improperly using two different standards for the initial appropriate unit determination was the method to provide the Union the unit composition it desired. The Regional Director may not use one standard for persons the union will accept in the unit and apply another standard to those the union wishes to exclude. That is what occurred herein, and it is the essence of arbitrary decision making and an abuse of discretion.

This Court need not make a determination on unit placement of the LPN's, but it should not enforce the NLRB's order. The NLRB plainly erred in its application of *Kindred,* because the Regional Director did not make a proper determination of a threshold appropriate unit which excluded LPNs.

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[12] The NLRB's Brief asserts the Regional Director included employees that the Union opposed being included. The initial Decision and Direction included only employees the union agreed to include. NLRB Brief p. 40, although three additional employees the Employer wished to include were allowed to vote by challenged ballot. ROA 322 (034). Subsequently the Regional Director issued an Erratum removing the challenged ballot provision. ROA 322 (040). This is a transparent manipulation. This minor change to the unit was made only days before the election and only after the Employer in its Request for Review, ROA 277-78, had challenged the original unit determination as based on the extent of union organization. The initial decision was no "mistake" it was a manipulation of an inconvenient fact.

Board Member Johnson apparently understood this issue and tried to correct the error saying he would have determined the exclusion of the LPNs was appropriate even under the traditional community of interest standard. ROA 289, n. 1, (Johnson concurring). He does not explain how the record supports his conclusion and Employer certainly maintains that there is no evidence that supports that conclusion applying the traditional community of interest test. Member Johnson's reasoning is not the basis for the Board's order before the Court.

The NLRB is asking the Court to affirm its outcome even though it did not make a required decision under the standard it has adopted. The NLRB has not correctly applied *Specialty*, as upheld in *Kindred*. *See* Employer's Principal Brief pp. 56-67.

The Supreme Court admonishes that the NLRB must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443, (1965). In articulating the "basis for its order", the Board is free to refer "to other decisions or its general policies laid down in its rules and its annual reports."

Id. at 443 n.6. However, where the Board has reached different conclusions in prior cases, it is essential that the "reasons for the decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness. *Id.* at 442.

At a minimum, the enforcement order should be denied. The the matter should be remanded for a proper determination of unit placement of the LPN's under applicable case law.

E. The Union's reliance on *Enterprise Leasing* is unfounded.

The union's reliance on *NLRB v. Enterprise Leasing Co. Southeast, LLC,* 722 F3d 609 (4th Cir. 2013) is misplaced. In *Enterprise*, enforcement of the NLRB's order was denied by the Court because the NLRB did not have a quorum when the case was decided. *Id.* at 660; see *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 130 S.Ct. 2635, 2639–45, 177 L.Ed.2d 162 (2010) (holding that, following a delegation of the NLRB's powers to a three-member group, two members cannot continue to exercise that delegated authority once the group's (and the Board's) membership falls to two).

Second, the unit placement issue under consideration in Enterprise is different from the issue in this case. In Enterprise the issue was whether technical employees "possess a sufficiently distinct community of interest apart from other technicals to warrant their establishment as a separate appropriate unit." The NLRB found that they did, based upon a substantial evidence analysis. *Id.* at 628-9, yet the Court refused to enforce the bargaining order because it concluded the Board did not have a quorum. *Id.* at p. 660.

Enterprise does not support the NLRB or Union arguments because it involved a different unit determination issue (whether a sub-group of employees possessed a sufficiently distinct community of interest to be carved out of a larger group as a separate bargaining unit) and, more importantly, the NLRB's decision was vacated. *Enterprise*, 722 F.3d at 660 (4th Cir. 2013) ("Because the Board lacked a quorum of three members when it issued its 2012 unfair labor practices decisions in both the *Enterprise* and *Huntington* cases, its decisions must be vacated.").

IV. Conclusion

The election is tainted and should be set aside. The Order the NLRB seeks to enforce is fatally defective. Enforcement of the NLRB's order must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing brief of VCNL, L.L.C. has been served on all counsel of record by the Court's electronic case filing system this 4th day of March, 2016

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A. This brief complies with the type-volume limitation of FED R. APP. P. 32(a)(7)(B) because:

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March 4, 2016